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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL COMMUNICATION COMMISSION

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
Rules and Regulations Implementing	)	CG Docket No. 02-278
the Telephone Consumer Protection	)	CG Docket No. 92-90
Act of 1991	)	
	)	

COMMENTS OF THE MAGAZINE PUBLISHERS OF AMERICA ON THE  
COMMISSIONS NOTICE OF PROPOSED RULEMAKING, NOTICE, AND  
ORDER

I. Introduction

On behalf of the membership of the Magazine Publishers of America, Inc. (the "MPA"), we are pleased to submit our comments in response to the Federal Communications Commission's Notice of Proposed Rule Making and Memorandum and Order.<sup>1</sup>

A. Description and Overview of MPA Membership

The MPA is the national trade association for consumer magazine publishers. Our membership includes approximately 240 domestic magazine publishing companies that publish more than 1,200 individual magazine titles, along with more than 100 international magazine publishers and more than 120 associate members who act as suppliers to the magazine industry. MPA

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<sup>1</sup> Notice of Proposed Rulemaking and Memorandum Opinion and Order (the "NPRM") released on September 18, 2002.

Hereinafter, the existing Telephone Consumer Protection Act of 1991, (47 U.S.C. § 227) is cited as the "TCPA or the "Existing Rule," and the Commission's

members' magazines include nationally distributed publications such as Time, Reader's Digest, and Good Housekeeping as well as smaller circulation publications.

B. The Size and Scope of the Telemarketing Industry and its Importance to Magazine Marketing

The long-term viability of the telemarketing industry is essential to the economic health and stability of many segments of the economy. In 2001, telemarketing to consumers generated approximately \$274.2 billion in sales, accounting for 27.2 percent of all consumer direct marketing sales and almost 4 percent of all consumer sales.<sup>2</sup> It is estimated that consumer telemarketing will grow by 8 percent per year to an expected \$402.8 billion in sales by 2006.<sup>3</sup> The expenditures of direct marketers' telemarketing to consumers were an estimated \$27.2 billion.<sup>4</sup> Over 415 thousand people are employed in the segment of the telemarketing industry that markets to consumers in the United States,<sup>5</sup> and more than 4.1 million additional jobs are impacted by the industry.<sup>6</sup> As these figures demonstrate, telemarketing is a vital part of the national economy, one

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proposed rulemaking and order as contained in the NPRM is cited as the "Proposed Rule."

<sup>2</sup> Economic Impact: U.S. Direct Marketing Today 2002, commissioned by the Direct Marketing Association, conducted by DRI/WEFA (hereinafter, the "DRI/WEFA Report"). Moreover, the economic impact figures discussed in this section are based only on the outbound consumer segment of the industry, so overall inbound and outbound figures are likely to be significantly higher.

<sup>3</sup> Id.

<sup>4</sup> Id. Moreover, the \$27.2 billion figure represents only outbound telemarketing expenditures so overall inbound and outbound expenditures are likely to be significantly higher.

<sup>5</sup> Id.

<sup>6</sup> Id.

that generates substantial sales of products and services, and creates significant

job opportunities for individuals at all levels. In particular, telemarketing affords unique job opportunities for entry-level individuals and persons with disabilities who might otherwise not be gainfully employed.

Telemarketing is crucial to the magazine publishing industry. In our industry, independent contractors generate the majority of initial subscriptions. Many of these contractors use telemarketing as an essential component of their marketing efforts. Independent contractors and magazine publishers directly also rely heavily on outbound telemarketing to existing customers for renewal of existing subscriptions.

If legitimate, established telemarketing sales practices were to be substantially restricted or curtailed by the current TCPA review, the economic impact on the telemarketing industry in general, and on MPA members in particular, would be severe. At a time when government is actively seeking ways to stimulate our economy, it seems counterintuitive to promulgate regulations that are guaranteed to result in a substantial loss of sales and loss of jobs without any countervailing consumer benefit.

C. General Summary of the MPA's Position

MPA fully supports the Commission's continued efforts to ensure that telemarketing activities are conducted in a way that protects public safety and the privacy of individuals while not unduly infringing upon constitutionally protected free speech and the continued viability of legitimate telemarketing practices.

In our industry, a premium is placed on retaining subscribers through multiple subscription periods because such subscribers are our most profitable customers. It is, therefore, in our members' interest to ensure that they are responsive to their subscribers' preferences regarding telemarketing.

MPA appreciates the Commission's approach to reconsidering the Rule and is aware of the fact that telemarketing practices have evolved since the Rule's inception. MPA would urge the Commission, however, as it did in 1992, to strike the proper balance in any regulations it may promulgate between protecting legitimate consumer privacy concerns with *not* unduly burdening legitimate telemarketing activities.

To assist the Commission in that process, we are commenting on three specific aspects of the Proposed Rule that will have the most significant impact upon our members.

First, we are deeply concerned about the establishment of a national do-not-call (DNC) registry. MPA believes the current system which requires telemarketers to maintain their own lists of consumers who do not wish to be called, combined with the Direct Marketing Association's (DMA) Telephone Preference Service (TPS) provides consumers with the most effective and rational choice in determining how to limit telemarketing calls. However, if the Commission does decide to establish its own national DNC List, the Commission should retain its current definition of an established business relationship as well as preempt state Do-Not-Call lists.

Second, while MPA understands the concerns voiced by the Commission and some consumers about the use of predictive dialers, the efficiencies afforded by predictive dialers make them a vital component of telemarketing sales calls. Our members would support the imposition of a reasonably low abandonment rate standard, such as five percent. We believe such an approach would most appropriately meet the needs of both consumers and businesses.

Third, the Commission's determination that a prior business relationship between a fax sender and recipient establishes the requisite consent to receive telephone facsimile advertisement transmissions<sup>7</sup> protects ongoing business relationships and does not have any adverse impact on consumer privacy.

## II. Establishing a National Do-Not-Call registry

The MPA fully supports the concept of an effective national DNC list which empowers consumers who do not wish to receive outbound telemarketing calls. However, MPA believes that the company-specific DNC List approach contained in the existing **TCPA** in conjunction with the existence of the Direct Marketing Association's (DMA) Telephone Preference Service (TPS) strikes the appropriate balance between consumer and business needs and among federal law, state law, and self-regulatory initiatives.

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<sup>7</sup> See 1995TCPA Reconsideration Order, 10FCC Rcd 12408, para. 37.

A. Company-specific DNC Lists Strike the Proper Balance Between Consumer and Telemarketer Needs

The MPA agrees with the conclusion reached by the Commission in its original TCPA rulemaking -- namely, that the company-specific DNC list is the most efficient and effective means to permit consumers to avoid unwanted telephone solicitations. See: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 F.C.C.R. 8752 (1992) (hereinafter, the "TCPA Rules and Regulations").

The company-specific approach benefits both consumers and businesses. Consumers are able to "opt out" of calls from parties from whom they do not wish to receive future solicitations, while continuing to receive telephone solicitations from those companies whose products or services **may** be of interest. Consumers also have the option currently to more broadly limit the number of telemarketing calls received by placing their names on the Telephone Preference Service ("TPS") maintained by the Direct Marketing Association ("DMA"). The TPS has been effectively administered by the DMA for over fifteen years and applies to a broad range of telemarketing calls.<sup>8</sup> Even with respect to the parties with whom a consumer has **an** established business relationship, he or she is free

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<sup>8</sup> All DMA members are required to scrub their calling lists against the TPS and the DMA has estimated that this accounts for eighty percent (80%) of the telemarketing market. See comments filed by the DMA in connection with the

to discontinue the relationship and cease any further calls upon request to the seller. TCPA Rules and Regulations, 7 F.C.C.R. 8752.

The company specific regulatory regime benefits telemarketers as well. As part of its initial rulemaking, the Commission determined that the cost of creating and maintaining a national DNC list was likely to exceed twenty million dollars (\$20,000,000) in the first year alone and an additional twenty million dollars (\$20,000,000) thereafter. TCPA Rules and Regulations, 7 F.C.C.R. 8752 ¶ 14.9 As the TCPA prohibits the Commission from charging consumers for inclusion on any national DNC list, these costs would be borne, in the first instance, by telemarketers. NPRM, 67 F.R. at 62676. The MPA believes such a result would be inequitable and unduly burdensome to telemarketers in light of the significantly less onerous alternative already in place under the current company-specific DNC list model.

Moreover, we believe it is likely that such increased telemarketing costs would ultimately be passed on to consumers in the form of higher prices for goods and services. Indeed, one of the reasons cited by the Commission for declining to adopt a national DNC list in 1992 was the significant costs associated with the maintenance and administration of such a list and the concern that these costs would ultimately be passed on to consumers. TCPA Rules and

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FTC's NPRM regarding revisions to the Telemarketing Sales Rule, 67 F.R. 4492 (January 30, 2002), (the "FTC NPRM").

<sup>9</sup> We believe it likely the cost of establishing and administering such a list today would well exceed these amounts.



Regulations, 7 F.C.C.R. 8752 ¶ 14. In addition, such a pass-through of costs in the form of higher prices would unfairly apply to all consumers - including those who choose not join the national DNC list. The MPA does not believe that these consumers should be required to subsidize another person's DNC list election.

Finally, we note that the current company-specific DNC regime has been in place since 1992 and the internal mechanisms and procedures required to comply with these requirements are already in place. As a result, the cost of continued compliance with the company-specific requirement would be significantly less onerous for telemarketers than compliance with any newly-implemented national DNC list.

B. No Federally Maintained DNC List Should be Created Without Preemption of State Lists.

If the Commission decides to establish a national DNC list, the Commission must preempt state DNC registries.<sup>10</sup> Congress clearly recognized in the TCPA that, as a practical matter, the efficiencies contemplated by the establishment of a federally-maintained national DNC List cannot be achieved unless that list preempts existing state DNC Lists. Absent preemption, the industry would be faced with the extraordinary burden of having to comply not only with the federal DNC List requirements, but also with the growing number of state DNC List requirements as well. Currently, 27 states have separate DNC

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<sup>10</sup> 47 USC § 227(e)(2)

provisions in their statutes.<sup>11</sup> Already, the burden on the industry of complying with these myriad state laws has been enormous, particularly because of the differences in frequency and renewal times for these lists and differing exemptions. Moreover, without state preemption, the enormous expense of a federally-administered DNC List could not be justified, as such a list would merely be duplicative of the lists already existing in the states and of the DMA's TPS.

Moreover, the Commission must take into account the fact that telemarketers and telemarketing service providers of all sizes will have to be able to interact with the Commission's national DNC List. Millions of numbers would be placed on the Commission's DNC list, with some estimates reportedly as high as 64 million names.<sup>12</sup> Many small businesses will be daunted by or unable to afford the computer processing time and expense involved in "scrubbing" their relatively small marketing lists against a database of that size. We note that the current cost associated with scrubbing a mailing list is approximately \$3 to \$5 per thousand names scrubbed. For a small business that is advertising nationally to a list of approximately 300,000 potential customers,

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<sup>11</sup> The states in question are Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Missouri, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Vermont, Wisconsin and Wyoming.

<sup>12</sup> Caroline E. Mayer, *FTC Anti-Telemarketer List Would Face Heavy Demand*, THE WASHINGTON POST, March 19, 2002, at A7.

the current estimated scrubbing cost is up to \$1500 (\$5 x 300) each time scrubbing occurs. These costs will increase substantially if small businesses are required to scrub against a Federal list in addition to the state registries because the charges they face are based both on the size of their lists and the size of the list against which their list is scrubbed. Needless to say, such costs may put the cost of telemarketing well beyond the reach of many, if not most, small businesses, and will likely drive some small businesses which rely heavily on telemarketing out of existence altogether. When one considers the fact that, without preemption, the national DNC List will be highly duplicative of the state DNC Lists and TPS, the substantial incremental costs to the industry are hardly balanced by the incremental number of names that will likely be captured.

In addition, absent state preemption, there is a high risk of consumer confusion. Consumers may be confused as to which lists apply to them, and what, if any, protections may be afforded by each of the lists. Moreover, to the extent that the state lists and the proposed national DNC List may not share the same statutory exemptions, this disparity is also likely to create consumer confusion and dissatisfaction with the efficacy of the lists.

C. The Current Definition of an Established Business Relationship Protects Consumers

Congress clearly intended that the passage of the TCPA should not disrupt the established relationship between a company and its customers. The definition of an established business relationship adopted by the Commission

protects consumer privacy while providing consumers with the opportunity to receive solicitations for products or services that are likely to be of interest to them. To the extent that a consumer does not wish to receive a call from a company with whom the consumer has an existing business relationship, the consumer can easily and effectively exercise this choice by asking to be placed on that company's internal do-not-call list.

In the case of magazines, our members' experience demonstrates that readers are very happy to get calls reminding them that their subscription is about to expire. For example, one of our members recently conducted a focus group with customers, some of whom did not generally want to receive telemarketing sales calls. However, when asked if they wanted to be called with a reminder that their subscriptions needed to be renewed, the response was "absolutely".

Our members generally consider an established business relationship to exist if the consumer has had any business-related contact with the company within the preceding two years. Such contact is not limited to purchases and orders, but may include other activities such as provision of goods or services without consideration, customer service inquiries, change of address requests and other similar contacts. Industry data shows that marketing is efficient and productive to consumers with whom the business has had contact during the preceding two-year period. Any more restrictive definition of a pre-existing

business relationship would severely impact the marketing efforts of our members, and result in substantial diminution of subscriber bases.

Accordingly, we urge that if the Commission feels a need to redefine the exemption for pre-existing business relationships (a step we do not recommend), the definition should be broad enough to include any consumer who has received a product or service from the seller within the preceding two year period or any consumer who has initiated contact with the seller within the preceding two year period.

D. The Commission should exempt magazines and newspapers from any national DNC registry.

If the Commission does establish a national DNC list, the Commission should exempt second-class (now called Periodicals class) permit holders, such as newspapers and magazines, from the requirements of such a list. When the TCPA was enacted, Congress clearly understood the vital role played by newspapers and magazines in our society by directing the Commission to consider "whether different methods and procedures may apply for . . . holders of second-class mailing permits."<sup>13</sup>

Historically, periodicals have been given special status because of their importance in disseminating news and information about a wide range of topics and the role magazines and newspapers have played in binding the nation

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<sup>13</sup> 47 U.S.C. § 227 (c)(1)(C)

together. Even more important, encouraging subscriptions to magazines and newspapers is good public policy. Periodicals provide low-cost information and entertainment to everyone no matter where they live. There are magazines for every age group and interest.

Furthermore, the nation is facing a serious literacy crisis. The results of the 2000 National Assessment of Educational Progress revealed that two-thirds of students tested below the proficient reading level. Restricting magazine sales sends the wrong message: we should be encouraging people of all ages to read more. By exempting periodicals from the requirements of the DNC list, the Commission will send a strong signal about the importance of reading.

The legislative history of the TCPA demonstrates that Congress believed that many legitimate businesses do conduct telephone solicitations without annoying customers.<sup>14</sup> As we have previously noted, because publishers rely on long-term relationships with their readers, it is in their own best interest to respect the marketing preferences of their customers. Furthermore, if a customer does not wish to be called by his or her newspaper or magazine publisher, the customer may request to be placed on the company-specific DNC list.

E. The FTC does not have statutory authority to establish a national DNC List.

The Commission requests comments regarding the FTC's proposal to create its own DNC registry. MPA respectfully disagrees with the FTC's position

that it has the authority to establish a DNC list. As noted in the NPRM, Congress expressly gave the Commission the authority to create and develop a national do-not-call database.<sup>15</sup> When it passed the TCFPA in 1994, Congress was presumably aware of the Commission's decision not to establish a national DNC List in 1992. Nevertheless, in the TCFPA, Congress did not expressly direct the FTC to create such a DNC List nor to review the Commission's decision not to establish such a list. Given this history, we firmly believe that the clear statutory authority to create such a list was vested by Congress in the Federal Communications Commission and that the establishment of such a list is outside the scope of the FTC's statutory authority.<sup>16</sup>

G. A Jointly Administered FTC/FCC National DNC List Could Be Problematic

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<sup>14</sup> 137 Congressional Record S16204 (November 7, 1991).

<sup>15</sup> Indeed, 47 U.S.C. 227 (c)(1) required the Commission to "initiate a rulemaking proceeding" that would, in part "(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific 'do not call' systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages."

<sup>16</sup> See H.R. Rep. No. 79-1980 (1946), reprinted in U.S. Gov't Administrative Procedure Act: Legislative History, S. Doc. No. 79-248, at 233, 274-75 (1946) ("[N]o agency may undertake directly or indirectly to exercise the functions of some other agency. The section confines each agency to the jurisdiction delegated to it by law. . . . It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted . . . . [Otherwise,] statutes would in effect be blank checks drawn to the credit of some administrative officer or board.").

We believe that the Commission's request for comment regarding the feasibility of acting in conjunction with the FTC to jointly administer a national DNC system is premature. As the FTC has not yet adopted final rules with respect to creation of a national DNC list, it is difficult to determine how the FTC's national DNC list would operate. We would therefore respectfully request the opportunity for further comment on the interplay between any Commission and FTC national DNC lists in the event that rules calling for the creation of such a list are adopted by the FTC.

Nevertheless, as noted in the Commission's NPRM, there do appear to be certain issues with the preliminary FTC proposal that suggest that a jointly-administered national DNC list would be problematic. The TCPA sets forth a number of specific requirements that the Commission would have to satisfy in adopting a national database. For example, it would be prohibited from charging consumers for inclusion on the national DNC list and would be required to design its database in such a way as to enable states to use it to administer or enforce state law. 47 U.S.C. § 227(c)(3). The FTC, however, would not be bound by these TCPA requirements in promulgating rules calling for the creation of a national DNC list. As such, the FTC could adopt a national DNC list which calls for the payment of a nominal registration fee by consumers for inclusion on the DNC list.<sup>17</sup> Moreover, the current FTC proposal does not

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<sup>17</sup> The MPA called for the imposition of nominal registration fees in its comments on the FTC NPRM. We, like many industry members, believe that such fees



expressly provide for the use of the national database by the states to administer or enforce state law. As such, the Commission may well be precluded by statute from adopting the national DNC list scheme ultimately adopted by the FTC.

In addition, the FTC's initial proposal would allow consumers to place their telephone numbers on the national DNC list via a telephone dial-in system using interactive voice response technology to answer the call coupled with automatic number identification ("ANI") technology to verify the telephone number from which the individual is dialing before adding that number to the list. See Notice of Proposed New Privacy Act System of Records, available at [www.ftc.gov/os/2002/03/frnprivacyactdonot.htm](http://www.ftc.gov/os/2002/03/frnprivacyactdonot.htm). In our comments to the FTC, we identified a number of serious problems with such an approach. While ANI data identifies the telephone number from which a call is made, there is no way to determine whether the person placing the call is, in fact, the authorized subscriber for the telephone number at issue. As such, the FTC's proposed DNC list is likely to face significant data integrity problems. Moreover, the Commission currently takes the position in connection with its company-specific DNC list requirements that telemarketers are not required to honor third party do not call requests. However, reliance on ANI data would lead exactly to this **result.**

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would more equitably balance the costs of maintaining the DNC list between telemarketers and those consumers who choose to join the list.

Furthermore, the FTC's initial proposal failed to recognize that the transmission of ANI data to the call recipient is controlled by the telephone companies and that telephone companies in some regions of the country do not currently transfer ANI data. Therefore, as a practical matter, consumers residing in these areas would be precluded from placing their names on the FTC's proposed national DNC list.

In light of these potential problems and uncertainties, we believe that the Commission should defer comment on the possible interaction with the proposed FTC national DNC list until such time as the FTC issues its final rules.

H. The Commission Must be Mindful of the Constitutional Standards Applicable to Government Regulation of Commercial Speech.

If the Commission establishes a national do not call list, it will have a substantial impact on truthful, non-deceptive telemarketing calls. As such, the Commission's proposal must meet the legal criteria for restricting commercial speech established by the Supreme Court in Central Hudson.<sup>18</sup> The Central Hudson test requires that regulations governing speech, including commercial speech, must directly advance the stated objectives and be no more restrictive than necessary to achieve the intended purpose.<sup>19</sup>

Because a national DNC list would significantly restrict telemarketers' commercial speech, the Commission must consider other, less stringent approaches. MPA would suggest that the Commission consider certifying the

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<sup>18</sup> Central Hudson, 447 U.S. at 566.

DMA's TPS and requiring telemarketers to subscribe to the TPS or other industry-maintained DNC lists that may be subsequently certified by the Commission.

The DMA has been effectively administering its TPS for over ten years. The list is well established, properly funded and covers calls made by DMA members and others that subscribe to the TPS. The MPA believes that the TPS, coupled with the company specific DNC lists, is sufficient to protect consumers, who desire such protection, from the intrusion of receiving unwanted calls.

### III. Use of Predictive Dialers

The Commission has requested comments regarding whether it should adopt rules to further restrict the use of predictive dialers to dial consumers' telephone numbers. In particular, the Commission seeks comments on whether it should reach a similar conclusion to the FTC which states that, under its rules, when a telemarketer calls a consumer, the telemarketer is required to disclose identifying information to the person receiving the call. According to the FTC, the consumer is receiving the call when the consumer answers the telephone. Therefore, if a predictive dialer abandons the call before the telemarketer identifies himself or herself, the FTC has suggested that the telemarketer may be violating the Telemarketing Sales Rule.

MPA respectfully disagrees with the FTC's interpretation. Predictive dialers, in fact, benefit consumers because they increase industry efficiency,

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<sup>19</sup> Id.

resulting in lower prices for consumers. We urge the Commission to strike the proper balance between the industry's need for efficiency, on the one hand, and the concerns of those consumers who object to abandoned calls, on the other hand, by setting a low threshold for abandoned calls, such as five percent over a thirty-day period.

A. A Low Abandonment Rate Standard, Such as Five Percent, Would Adequately Protect Consumers.

As a practical matter, we note that the industry uses predictive dialers because they greatly enhance overall efficiency. By automatically dialing calls for sales operators, predictive dialers allow operators to handle calls more effectively and efficiently by reducing the time spent on administrative activities such as dialing a phone number. This in turn allows marketers to offer consumers a greater variety of products and services at lower prices than might otherwise be available in the marketplace.

Although predictive dialers provide significant benefits to both consumers and industry, MPA understands that the Commission must balance these benefits against consumer objections regarding abandoned calls. While the MPA supports the concept that predictive dialer abandonment rates should be as low as reasonably possible, the rate should not be set so low that it would eliminate the efficiencies generated by the use of this technology.

If the abandonment rate is set too low, there may be a significant reduction in the productivity of telemarketing operations and some companies in

the publishing industry could be forced to abandon telemarketing campaigns entirely. Those publishing companies that continue conducting telemarketing campaigns would almost certainly be required to use the larger telemarketing service providers because the smaller service providers will be unlikely to be able to absorb the increased costs associated with the lower productivity rates. The imposition of an overly restrictive standard may have a disproportionate competitive impact on smaller telemarketers, and would likely drive a number of those small businesses out of existence.

Furthermore, we would urge the Commission to consider the totality of the Rule in evaluating potential actions to reduce the number of abandoned calls. We note in this regard that the concerns associated with abandoned calls will be almost completely resolved if the Commission decides to establish a national DNC list. Obviously, if a consumer finds abandoned calls annoying, the consumer would have the option of signing up for the national DNC registry to avoid abandoned calls all together.

If the Commission decides to set a standard for abandoned calls, **MPA** recommends that the Commission set the standard at "five percent of calls over a thirty day period." The "five percent" element of the standard would be consistent with the DMA's existing self-regulatory standard. The "thirty days" element of the standard is necessary to account for abandonment rate fluctuations that are due to differences in calling times, types of offers, number of operators available, and other similar factors.

In addition, the Commission should ensure that the definition of an “abandoned call” is appropriately limited to include only those circumstances in which a call is disconnected by the predictive dialer because no operator was available. Calls which are disconnected for other reasons, such as no response from the consumer, should not fall within the definition of an abandoned call.

As part of its recommendation, MPA would also urge the Commission to include a safe harbor provision, similar to that which currently exists in Section 310.4(b)(2) of the FTC’s Telemarketing Sales Rule, for compliance with the recommended five percent abandonment rate. Since the abandonment rate can be affected by technical malfunctions or errors, marketers and telemarketers must have protection from liability in the event of inadvertent errors. Accordingly, under this safe harbor approach, a seller or telemarketer would not be deemed to be liable for violating this provision if it has established and implemented procedures to comply with the five percent abandonment rate.

IV. A Prior Business Relationship Between a Fax Sender and Recipient Establishes the Requisite Consent to Receive Telephone Facsimile Advertisement Transmissions.

In 1992, the Commission determined that a prior business relationship between a fax sender and recipient establishes the requisite consent to receive a fax transmission. Our members believe that the Commission’s order has protected ongoing business relationships without any adverse impact on consumer privacy. Most customers welcome faxes with special offers and packages that may be of interest to them.

Under the TCPA, the identity of the advertiser must be on the first page of a fax with a phone or fax number where the advertiser may be reached. A customer who prefers not to receive these faxes may contact the sender and asked to be removed from the sender's database. It is in the interest of the advertiser to respect its customer's request. If the Commission determines that this approach will not sufficiently protect consumers from unsolicited facsimiles, MPA would respectfully suggest that the Commission consider requiring companies to maintain a Do-Not-Fax list, similar to the company specific DNC list for telemarketing calls.

#### Conclusion

We thank the Commission for providing us with the opportunity to submit the preceding comments on behalf of our membership. Our organization is committed to working with the Commission to ensure that the revised Rule represents an appropriate balancing of the needs and requirements of the various stakeholders in the Rule revision process. If you have any questions or concerns regarding these comments or any other aspects of the MPA, please feel free to contact us.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James R. Cregan", with a stylized flourish extending from the end.

James R. Cregan  
Executive Vice President  
Magazine Publishers of America